SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

SUN PUBLISHING COMPANY,

Petitioner,

v.

L. METCALF E. WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Preliminary Statement.

The opinions below, the statement of the matter involved, jurisdiction and the questions presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II.

Summary of Argument.

Point 1. The decree constitutes a particular form of abridgment of the constitutional guaranty of a free press

not heretofore reviewed by this Court. The Act in controversy is not a general law affecting all persons alike. Section 13 exempts many types of employees from the so-called benefits of the Act. Furthermore it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry in the United States was classified in this Act for purpose of regulation. That business was the newspaper publishing business. The question presented is unique in that for the first time there has been presented to this Court the question of the power of Congress to classify the press for purposes of regulation through the device of using the factors of volume of circulation, frequency of issue and area of distribution to accomplish the results desired. If the power of Congress so to classify the press be approved by this Court, then there is no limit to the extent to which Congress may burden any particular portion of the press or any particular member thereof it so desires. The guaranty contained in the First Amendment is not limited to the prohibition of restrictions upon the content of publications but extends to all such measures as tend to restrict content, circulation or the ability of a newspaper to serve its readers.

Point 2. The holding that application of Sections 6 and 7 of the Act to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict with the principles announced by this Court is *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936). The exemption of employees of a particular group of newspapers, as provided for in Section 13 (a) (8) of the Act constitutes an arbitrary and injurious discrimination in that it results in a classification in violation of petitioner's rights as guaranteed by the First and Fifth Amendments to the Constitution of the United States.

Point 3. The holding that the Fair Labor Standards Act is applicable to petitioner's business is in conflict with decisions of this Court under the Act and with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. (2d) 111 (Certiorari denied January 17, 1944). The Fair Labor Standards Act applies only to employees engaged in commerce or in producing goods for commerce. This Court has held that it cannot conclude that all phases of an intrastate business are covered by the Act solely because that business makes its purchases interstate. This Court has also held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. Petitioner's newspaper herein sends less than two per cent of its Sunday circulation outside of the state of circulation and less than three per cent of its daily publication outside of the state. Its business falls squarely within the *de minimis* doctrine.

Point 4. The Circuit Court of Appeals' decision instead of maintaining the preferred position accorded to the press by reason of the provisions of the First Amendment as construed by this Court deprives the press of that position and places it in one inferior to such establishments as dry cleaning establishments, laundries, barber shops, beauty and massage parlors, shoe shining stands and the like. It raises the question as to whether the press whose sole business is the gathering and dissemination of information in the printed form is engaged in service or merely in producing goods for sale.

Point 5. The definitions of employees "employed in a bona fide executive * * * professional * * * capacity" as promulgated by the Administrator, applied to the newspaper publishing business by him, and upheld by

the Circuit Court of Appeals are arbitrary and capricious. The record herein demonstrates that the Administrator instead of following the custom and the practice of the newspaper publishing business in respect of its departmental executives in his definition of an employee employed in a bona fide executive capacity so defined it as to purposely remove from the executive classification foremen in the mechanical departments of more than 1,000 newspapers in the United States in disregard of custom, practice, union contracts and powers exercised by the executives themselves. The record also shows in respect of the Administrator's definition of employees employed in a bona fide professional capacity, as applied to the newspaper publishing business by him and upheld by the Circuit Court of Appeals, that that definition was purposely drafted so as to extend the so-called "benefits" of the Act to as many employees employed in a professional capacity as possible by fixing a minimum salary for their employment. The Administrator in his definition specifically exempted lawyers and doctors licensed to practice their profession from this salary limitation. The Circuit Court of Appeals in its opinion held that, notwithstanding the historic treatment of those who gather, write and edit the news as persons employed in a profession, they were not professional in any sense of the word, inter alia, because none of them had taken examinations for competency or secured licenses from any authority in order to practice their professions. The holding of the Circuit Court of Appeals in this respect is repugnant to the guaranty of the First Amendment which forever prohibited the licensing of the press or any person engaged in the performance of any of its functions as a condition precedent to engaging therein.

Point 6. The holding by the Circuit Court of Appeals that petitioner is responsible for the overtime hours claimed to

have been worked by its employees in violation of its instructions is in conflict with the overwhelming weight of authority as evidenced by the decisions of other courts and should be determined by this Court. Irrespective of the application of the Act to petitioner's business, the record herein shows that petitioner ordered all of its employees, except executives, not to work any overtime unless specifically instructed to do so. The record also shows that the employees were ordered to turn in their time slips for each payroll week accurately setting forth the hours worked, day by day, before they could receive their pay. The record further shows that no employee ever made any claim upon this petitioner for overtime and the testimony given by certain of its employees and former employees shows that they disregarded petitioner's instructions both as to overtime work and the accurate reporting of hours worked. The Circuit Court of Appeals held petitioner liable for violations of Section 7 of the Act because its employees refused to carry out its instructions. This finding should be reviewed by this Court.

III.

Argument.

Point 1.

The decree constitutes a particular form of abridgment of the constitutional guaranty of a free press not heretofore reviewed by this Court.

The controlling issue in this case is whether Congress in the exercise of its regulatory powers derived from Article I, Section 8, Clause 3 of the Constitution can nullify the prohibition against restraints of the press embraced in the First Amendment to the Constitution.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types

of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of business and industry was classified in this Act for purposes of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13 (a) (8) all weekly and semi-weekly newspapers with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

The record shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 10,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000 (R. 451).

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies (R. 451).

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent

of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (R. 451-452; Exhibit A to Stipulation—Small Daily Newspapers under Fair Labor Standards Act.)

Competing with petitioner's newspaper, The Jackson Sun, with a daily circulation of approximately 9,000 and a Sunday circulation of approximately 11,000, are fourteen weekly newspapers published in the vicinity of Jackson all of which are exempt from the burdens of the Act by reason of the provisions of Section 13 (a) (8) (R. 450-451).

Analysis of the provisions of Section 13 (a) (8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution. This Court has held that even a general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment. *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943).

This Act lays a direct burden on the press. The business of preparing and printing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation. If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict their circulation. Petitioner could remove itself wholly from the possible application of this law by eliminating its 200 out of state subscribers and could, irrespective of the law here challenged, operate more profitably by confining its circulation to the State of Tennessee (R. 571). Thus, the effect of the application of this Act to the newspaper publishing business is to restrict circulation. This Court has held that restriction of circulation violates the guaranty of the First

Amendment. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); and *Near* v. *Minnesota*, 283 U. S. 697 (1931).

This Act regulates the press by classifying it. It must be conceded that once the power to regulate is admitted that power is absolute. *A. Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934). So, if Congress has the power to classify the press as it has done here, it can exercise that power so as to benefit or burden any particular portion of the press it so desires.

The decision of the Circuit Court of Appeals in effect holds that the press is so vested with a public interest that it can be regulated, restricted, restrained and controlled just like a stock exchange, a commodity exchange, a stockyard, a railroad, an electric utility, all of which can be required to take out a license, obtain certificates of convenience or procure charters with special limitations before they can operate. Therefore, this Court should review the Circuit Court of Appeals' decision to determine whether the public good requires that the press shall be subject to such a control in the light of the provisions of the First Amendment to the Constitution of the United States.

The issue in the broad aspects presented by this controversy has not heretofore been reviewed by this Court. *Associated Press* v. *NLRB*, 301 U. S. 103 (1937), involved the sole issue whether an order of reinstatement of an employee discharged for engaging in union activities infringed the constitutional guaranty and is not decisive of the issue here.

POINT 2.

The holding that application of Sections 6 and 7 of the Act to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination against petitioner in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict with the principles announced by this Court in Grosjean v. American Press Co., supra.

As has been pointed out hereinbefore Section 13 (a) (8) of the Act classifies the press on the basis of volume of circulation, frequency of issue and area of distribution in such a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are fourteen weekly newspapers published in the vicinity of Jackson, Tennessee, where petitioner's daily and Sunday paper is published. The total circulation of these papers, all of which are competitive with petitioner, is 100 per cent greater than petitioner's daily and 75 per cent greater than petitioner's Sunday circulation (R. 37-38, 451). The record shows that petitioner's newspaper is engaged in identically the same business as the exempt newspapers.

Therefore, the exemption of employees of a particular group of newspapers, as provided for in Section 13 (a) (8) of the Act, constitutes an arbitrary and injurious discrimination in that it is a classification in violation of petitioner's rights as guaranteed by the Fifth Amendment to the Constitution.

It follows that the lower court's holding that the application of Sections 6 and 7 to petitioner's business does not constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution is in conflict

with the principles announced by this Court in *Grosjean* v. *American Press Co., supra,* and should be reviewed by this Court.

POINT 3.

The holding that the Fair Labor Standards Act is applicable to petitioner's business is in conflict with decisions of this Court under the Act and with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in Schroepfer v. *A. S. Abell Co., 138 F. (2d) 111 (Certiorari denied January 17, 1944).*

The Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act. *A. B. Kirschbaum Co.* v. *Walling,* 316 U. S. 517 (1942); *Walling* v. *Jacksonville Paper Co.,* 317 U. S. 564 (1943).

This Court last term in *Walling* v. *Jacksonville Paper Co., supra,* at page 571, stated that "* * * we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins* v. *Carr Brothers Co.,* 317 U. S. 572 (1943), this Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state to customers within the state.

The United States Circuit Court of Appeals for the Fourth Circuit followed these decisions in *Schroepfer* v. *A. S. Abell Co., supra,* when it stated:

> "* * * there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers,

> as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. (2d) at page 114.)

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920). Thus, petitioner's newspaper publishing business falls within the category of local business which Congress left to the protection of the states. *Walling* v. *Jacksonville Paper Co.*, *supra.*

The record herein shows that less than three per cent of petitioner's total circulation is mailed to subscribers outside of the state.

Since this interstate business is so small a percentage of petitioner's business and since it is not an essential part of the service petitioner renders its customers, it comes within the *de minimis* doctrine.

This Court in *NLRB* v. *Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the doctrine of *de minimis*. Since, as this Court has pointed out in *A. B. Kirschbaum Co.* v. *Walling, supra*, this Act is more narrowly confined than the National Labor Relations Act, it is clear that the doctrine of *de minimis* should be applied here.

In a number of cases arising under the Act, the courts have applied this doctrine by holding that where the interstate business of the employer constitutes only a small por-

tion of the total business and where it is not an integral part of the service rendered the Act does not apply. *Goldberg* v. *Worman,* 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Zehring* v. *Brown Materials,* 48 F. Supp. 740 (S. D. Calif., January 19, 1943); *Sapp et al.* v. *Horton's Laundry,* 7 Wage and Hour Reporter 144 (N. D. Georgia, January 18, 1944).

In *Mabee et al.* v. *White Plains Publishing Co.,* 7 Wage and Hour Reporter 64 (N. Y. Supreme Court, Appellate Division, December 29, 1943), it was held that the mailing of less than one-half of one per cent of its total circulation to subscribers temporarily out of the state did not bring a newspaper within the coverage of the Act. As pointed out by the Appellate Division in the *Mabee* case, the small out of state circulation was only an incidental part of its essentially local business.[1]

Associated Press v. *NLRB, supra,* is not in conflict with the foregoing principles. The Associated Press is not a newspaper. It is an organization directly engaged in interstate communication in gathering and disseminating information to newspapers and others.

Since the holding of the court below that the Act is applicable to petitioner's business because its employees are engaged in commerce or the production of goods for commerce is in conflict with decisions of this Court under the Act and with that of the Fourth Circuit Court of Appeals in *Schroepfer* v. *A. S. Abell Co., supra,* this Court should review that holding.

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[1] In this case the judgment of the trial court when reduced to dollars and cents cost imposed a burden of $1.12½ on each copy of the defendant's newspapers sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy.

Point 4.

The question whether petitioner's business is exempt from the application of the Act under Section 13 (a) (2) is an important one in the administration of the Act and should be decided by this Court.

Section 13 (a) (2) of the Act provides that:

> "The provisions of Sections 6 and 7 shall not apply with respect to * * * any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

There is no dispute in the record that petitioner in its newspaper publishing business is engaged in the sole business of gathering information and disseminating it in the printed form.

The question is whether or not petitioner's newspaper, The Jackson Sun, constitutes a necessary part of the service as the vehicle of dissemination or constitutes "goods" produced for commerce because of the infinitesimal portion of petitioner's newspaper circulation distributed across state lines.

From the day the first newspaper was published in the United States until the present time the business of the press has been one of service to the public in the nature of disseminating vital information in the printed form. That information consists of news, editorial comment and advertising (R. 30).

This Court has reiterated time and time again the importance of this service to the public and in its most recent pronouncement on this subject in *Murdock* v. *Pennsylvania*, *supra*, this Court stated that freedom of the press is in a preferred position as against all other types of business.

Yet the Administrator has held in respect of the exemption of Section 13 (a) (2) that dry cleaning establishments,

laundries, barber shops, beauty and massage parlors, shoe shining stands, and the like are in a preferred position as against the press (1942 Wage and Hour Manual, Part 1, Ch. 7, page 332-333), and the order of the lower court affirms this holding.

The statutory exemption here under consideration does not provide for a definition by the Administrator. Therefore, it is incumbent upon the courts to issue authoritative rulings to guide him.

This Court's decision in *A. B. Kirschbaum Co.* v. *Walling, supra,* is not helpful in determining whether petitioner's employees are exempt under Section 13 (a) (2).

The question of whether petitioner's employees are exempt under Section 13 (a) (2) is important not only to petitioner but to all other newspaper publishers the greater part of whose service to readers is rendered intrastate. The settlement of this question is important in the administration of the Act and this Court should decide it.

Point 5.

*The definitions of "employees employed in a bona fide executive * * * professional * * * capacity" as promulgated by the Administrator and applied to the newspaper publishing business are arbitrary, capricious and unreasonable and should be reviewed by this Court.*

Section 13 (a) (1) provides that:

> "The provisions of Sections 6 and 7 shall not apply with respect to any employee employed in a bona fide executive, administrative, professional * * * capacity * * * (as such terms are defined and delimited by regulations of the Administrator)."

Petitioner contended in the District Court and again in the Circuit Court of Appeals that even though the Act itself be held applicable to its newspaper publishing business

all of its employees engaged in gathering, writing and editing the news are exempt from the minimum wage and overtime provisions of the law under Section 13 (a) (1) as being employed in a bona fide professional capacity and its working foremen, and more specifically its composing room foreman, exempt from the overtime provisions of the law by reason of Section 13 (a) (1) of the Act as being employed in a bona fide executive capacity.

Petitioner attacked the definitions of "employed in a bona fide executive * * * professional capacity" as promulgated by the Administrator and applied to its newspaper publishing business as arbitrary, capricious and unreasonable and contrary to the custom of the business.

The Administrator disregarded the customs and practices of newspaper publishers and of the newspaper mechanical trade unions for more than 50 years when in his definition of an executive he placed a limitation on the executive's work in such a way as to remove a newspaper foreman from the classification of an executive if he works more than eight hours per week at the same kind of work as is performed by a journeyman under his direction. The record shows that by that limitation the Administrator attempted to remove working foremen on more than 1,000 daily newspapers in the United States from their status as bona fide executives, recognized for more than 50 years in the business by employer and employee groups alike. Working foremen have the exclusive right to hire, fire and assign the journeymen and apprentices working under them to their daily tasks. Not even the President of petitioner company could hire or fire or assign an employee to work in its composing room (R. 482).

It is significant that in his definitions of "employees employed in a bona fide executive, administrative, professional * * * capacity" the Administrator placed a salary limitation of $30 per week upon executive employees

and $200 per month upon administrative and professional employees.

It is respectfully submitted to this Court that the amount of financial consideration received by an employee does not in any sense of the word determine his status.

Courts have refused to accept the salary requirement as a valid element in the definition of an "executive" and have held that the Administrator exceeded the powers conferred upon him by so defining executive employees. *Devoe* v. *Atlanta Paper Co.*, 40 F. Supp. 284 (N. D. Georgia, July 31, 1941); *Buckner* v. *Armour & Co.*, 5 Wage and Hour Reporter 624 (N. D. Texas, July 22, 1942).

It is equally true that a salary requirement has no place in the definition of a "professional".

In respect of the regulation promulgated by the Administrator defining a professional employee, the record shows that the object of this particular regulation was to extend the "benefits" of the Act as widely as possible (R. 496). To that end a minimum salary qualification of $200 per month was ordered for all professionals other than lawyers or doctors holding licenses to practice and actually engaged in the practice of their professions. Thus the Administrator sought to determine professional status for certain professional employees not solely on what they do but what they do plus what they get for doing it.

While the record showed almost universal acceptance of the fact, prior to the enactment of the Act in controversy, that employment in the field of gathering, writing and editing the news is professional in nature, the Circuit Court of Appeals in upholding this regulation observed that it knew of no state that requires of newspaper reporters "an examination for competency, or license to practice; and there are editors of long experience and trained judgment who

* * * believe that the only practical school of journalism is the newspaper office.'' [2]

It is respectfully submitted that the very thought of licensed reporters and editors as discussed by the Circuit Court of Appeals is repugnant to the guaranty of the First Amendment and that this Court should review the record to determine whether the definition of a bona fide professional employee, as applied to the newspaper publishing business, is not arbitrary and capricious and that the same should be done with respect to respondent's definition of an executive, as applied to the newspaper business in a manner contrary to custom, practice and authority exercised by executives for more than 50 years.

Point 6.

The holding by the Circuit Court of Appeals that petitioner is responsible for the failure of its employees to carry out its instructions in respect of hours to be worked and reports to be made thereon is in conflict with the decisions of numerous other courts, has not heretofore been presented to this Court, and should be determined by this Court.

It is not disputed in the record that, following the first inspection by an agent of the respondent, the general manager of petitioner issued instructions to all employees, other than executives, to perform their work within the maximum number of hours specified under the Act here in

[2] The record shows there are 32 Class A schools of journalism in the United States today; that there are more than 700 other colleges giving regular courses in journalism and that the requirements for admission to the graduate schools (Class A) are similar to the requirements of graduate schools of medicine and law (R. 481). It will be recalled that only a few years ago many lawyers preferred lawyers trained in law offices to law schools, just as the Circuit Court of Appeals says some newspaper editors now prefer newspaper office trained journalists to graduates of schools of journalism. That question of preference in the method of training does not affect the status of one engaged in a profession, however.

controversy and to turn in time slips on each payday showing the number of hours worked each day during the preceding work week. With one exception, every employee who testified for the government in respect of these instructions and as to the nature of the time slips turned in testified that he either disregarded the instructions in toto or turned in time slips that were inaccurate, or both. The exception was P. D. Kersh, working foreman in the composing room, who kept no record of his own time because he considered himself an executive but who did keep a record of the time put in by the employees under his supervision for whom he turned in time slips each week as required by the contract with his union. The time slips for his subordinates were accurate as to hours worked except on Saturday nights where under the union contract 6½ hours constituted a day's work and anything over 6½ hours was calculated as overtime beyond 8 hours.

It has been held that an employee is not entitled to recover statutory overtime compensation in an action wherein he claimed to have worked overtime when the evidence showed that the company instructed him to work the statutory hours and that the additional time he spent on the job was of his own volition and without knowledge of the company. *Anderson* v. *Sun Bright Lumber Co.*, 6 Wage and Hour Reporter 697 (Tennessee Court of Appeals, May 26, 1943).

It has been held that an employer has the right under the Fair Labor Standards Act to establish a rule or policy prohibiting overtime work by employees. *Jackson* v. *Derby Oil Co.*, 6 Wage and Hour Reporter 747 (Kansas Supreme Court, January 12, 1943).

In two recent New York cases the court held that the burden was upon the plaintiff to establish not alone the fact of overtime work but the quantity of overtime work

each week and that the complaining employees who kept no record of the hours they claimed to have worked and accepted their wages without protest were without remedy under the Act. *Ralston* v. *Karp Metal Products Co.*, 5 Wage and Hour Reporter 937 (New York Supreme Court, Kings County, November 17, 1942); *Rosen* v. *Weissman*, 5 Wage and Hour Reporter 938 (New York City Court, Kings County, November 17, 1942).

It is significant in this case that the employees were instructed to keep records of their time and to file time slips with their employer recording their time before they could receive their pay. It is even more significant that none of them kept any other records and that those who were called to the witness stand, again with the single exception of Kersh who testified that he could not compute his time because he had kept no record of it, attempted to reconstruct their time out of their heads.

The sole question as to violation of the provisions of Section 6 is presented in respect of part-time employees in the mail room of petitioner's newspaper. If, as contended by petitioner, it is not engaged in commerce or in producing goods for commerce and that the *de minimis* doctrine applies, these employees are not covered by the Act.

This Court, however, has never passed upon the question raised in the foregoing cases as to the responsibility of an employer for the deliberate failure of his employees to carry out his instructions in respect of overtime. Neither has it determined the application of the *de minimis* doctrine to the newspaper publishing business in respect of the infinitesimal amount of out of state circulation involved. The questions thus raised are now presented to this Court for the first time and it is respectfully submitted they should be decided.

IV.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 18, 1944.

APPENDIX.

Constitutional Provisions Involved.

The constitutional provisions involved are Article I, Section 8, Clause 3, of the Constitution of the United States and the First and Fifth Amendments to the Constitution of the United States.

Article I, Section 8, Clause 3, of the Constitution of the United States provides that:

> "The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[PUBLIC—No. 718—75TH CONGRESS]

[CHAPTER 676—3D SESSION]

[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages tobe paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (c).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such